No. 18-6210

In The
Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

WISCONSIN,

Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF *AMICUS CURIAE* RESTORE THE FOURTH, INC. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of the *Amicus Curiae*	1
Summary of the Argument	2
Argument	3
I. Consent is a hallowed legal concept	3
A. Consent is an affirmation of free will	3
B. The Framers recognized that consent is fundamentally different from what is "prescribed by law"	6
C. For consent to validate a government search, such consent must have been given freely and voluntarily	8
II. Implied-consent laws have no place in Fourth Amendment jurisprudence	11
A. Implied-consent laws deem consent to exist to government searches	12
B. None of the grounds on which implied-consent laws deem consent to exist withstand close scrutiny	14
C. The Framers would have rejected the idea of implied-consent laws	16
III. The Court should clarify in *Mitchell* that actual consent is the only kind of consent that the Fourth Amendment respects	19
Conclusion	21

TABLE OF AUTHORITIES

Page

CASES

Birchfeld v. North Dakota, 136 S. Ct. 2160 (2016) 2, 11, 12, 14

Brinegar v. United States, 338 U.S. 160 (1949) 19

Bumper v. North Carolina, 391 U.S. 543 (1968) 10

Cary v. Hotailing, 1 Hill 311 (N.Y. Sup. Ct. 1841) 4

City of Los Angeles v. Patel, 135 S. Ct. 2443 (2014) 8, 16

Commw. v. Kaynes, 116 A.3d 640 (Pa. Super. Ct. 2015) 17

Cordova v. City of Albuquerque, 816 F.3d 645 (10th Cir. 2016) 5

Donovan v. RRL Corp., 27 P.3d 702 (Cal. 2001) 3

Elkins v. District of Columbia, 710 F. Supp. 2d 53 (D.D.C. 2010) 20

Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982) 7, 8, 9

Florida v. Jimeno, 500 U.S. 248 (1991) 10, 20

Frost & Frost Trucking Co. v. R.R. Comm'n of Cal., 271 U.S. 583 (1926) 14, 15

Gager v. Dell Fin. Servs., LLC, 727 F.3d 265 (3d Cir. 2013) 4, 5, 13

Georgia v. Randolph, 547 U.S. 103 (2006) 10

Horne v. Department of Agriculture, 135 S. Ct. 2419 (2015) 15

TABLE OF AUTHORITIES – Continued

Page

Kaminsky v. Schriro, No. 18-403, 2019 U.S. App. LEXIS 2288 (2d Cir. Jan. 24, 2019) 12

Katz v. United States, 389 U.S. 347 (1967) 8, 9

Korematsu v. United States, 323 U.S. 214 (1944) 20

Krulewitch v. United States, 336 U.S. 440 (1949) 19

Kyllo v. United States, 533 U.S. 27 (2001) 20

Lawyers Title Ins. Corp. v. Dearborn Title Corp., 904 F. Supp. 818 (N.D. Ill. 1995) 12

Luis v. United States, 136 S. Ct. 1083 (2016) 2

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) 15

McClellan v. Allstate Ins. Co., 247 A.2d 58 (D.C. 1968) 4

Mitchell v. Mitchell, 55 N.W. 1134 (Minn. 1893) 5, 6, 19

Riley v. California, 134 S. Ct. 2473 (2014) 17, 19

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 10

Schweitzer v. Comenity Bank, 866 F.3d 1273 (11th Cir. 2017) 3, 5

Stanford v. Texas, 379 U.S. 476 (1965) 17

State v. Glushko, 266 P.3d 50 (Or. 2011) 3

State v. King, 209 A.2d 110 (N.J. 1965) 4

State v. Ochoa, 792 N.W.2d 260 (Iowa 2010) 18

United States v. Biswell, 406 U.S. 311 (1972) 16

United States v. Carloss, 818 F.3d 988 (10th Cir. 2016) 11, 13, 14, 21

TABLE OF AUTHORITIES – Continued

Page

United States v. Carter, 378 F.3d 584 (6th Cir. 2004) 10, 15

United States v. Chadwick, 433 U.S. 1 (1977) 17

United States v. Elliott, 210 F. Supp. 357 (D. Mass. 1962) 16

United States v. Griffin, 530 F.2d 739 (7th Cir. 1976) 12

United States v. Iverson, 897 F.3d 450 (2d Cir. 2018) 12

United States v. Jones, 565 U.S. 400 (2012) 9

United States v. Lattimore, 87 F.3d 647 (4th Cir. 1996) 11

United States v. Lopez, 514 U.S. 549 (1995) 3

United States v. Rabinowitz, 339 U.S. 56 (1950) 16

United States v. Ramsey, 431 U.S. 606 (1977) 9

Virginia v. Moore, 553 U.S. 164 (2008) 17

Weems v. United States, 217 U.S. 349 (1910) 19

Wilkinson v. Leland, 27 U.S. 627 (1829) 4

CONSTITUTIONAL PROVISIONS

U.S. CONST., amend. III 7, 8, 10

U.S. CONST., amend. IV ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

STATUTES

1767 Townshend Act 18

ARIZ. REV. STAT. § 28-1321(C) (2018) 13

ARK. CODE ANN. § 5-65-202(b) (2018) 13

COLO. REV. STAT. § 42-4-1301.1(8) (2018) 13

GA. CODE ANN. (2018)

§ 40-5-55(a) 13

§ 40-5-55(b) 13

OHIO REV. CODE ANN. § 4511.191(A)(4) (2018) 13

Quartering Acts of 1765 and 1774 7

OTHER AUTHORITIES

2 WORKS OF JOHN ADAMS (C. Adams ed. 1850) 17

DAN DOBBS ET AL., 1 THE LAW OF TORTS § 108 (2d ed. 2011) 5

GEORGE CRABB, ENGLISH SYNONYMES (London, Baldwin & Craddock, 6th ed. 1837) 3

JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED & PROVED (Boston, Edes & Gill 1764) 6

Jess Aloe, *Proposed Law Could Allow Warrantless Phone Searches*, BURLINGTON (VT.) FREE PRESS, Jan. 17, 2016, http://bfpne.ws/1UYvnpj 20

NOAH WEBSTER, 1 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (reprint 1970) 3

TABLE OF AUTHORITIES – Continued

Page

RESTATEMENT (SECOND) OF TORTS (Am. Law Inst. 1979)

§ 892A cmt. a 4

§ 892A cmt. c 5

§ 892A cmt. i 5

§ 892A(1) 4

§ 892A(4) 5

Tracy Maclin & Julia Mirabella, *Framing the Fourth*, 109 MICH. L. REV. 1049 (2011) 17

Vt. H.B. 527 (2016) 20

INTEREST OF THE *AMICUS CURIAE*[1]

Restore the Fourth, Inc. ("Restore the Fourth") is a national, non-partisan civil liberties organization dedicated to the robust enforcement of the Fourth Amendment to the U.S. Constitution. Restore the Fourth believes that everyone is entitled to privacy in their persons, homes, papers, and effects and that modern changes to technology, governance, and law should foster—not hinder—the protection of this right.

To advance these principles, Restore the Fourth oversees a network of local chapters, whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises a variety of grassroots activities designed to bolster political recognition of Fourth Amendment rights. On the national level, Restore the Fourth also files *amicus curiae* briefs in significant Fourth Amendment cases.[2]

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[1] This *amicus curiae* brief is filed based on the blanket consent of all parties. No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than Restore the Fourth, Inc. and its counsel, contribute money intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Collins v. Virginia*, No. 16-1027 (U.S. filed Nov. 17, 2017); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Byrd v. United States*, No. 16-1371 (U.S. filed Nov. 16, 2017); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Carpenter v. United States*, No. 16-402 (U.S. filed Aug. 14, 2017).

SUMMARY OF THE ARGUMENT

This case affords the Court an important chance to clarify when consent will validate a government search under the Fourth Amendment. At issue is "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement." Cert. Pet. ii. The Wisconsin Supreme Court said 'yes' based on a rationale that, under these circumstances, amounts to a contradiction-in-terms: implied consent.

In the past, this Court has "referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply" with government-administered blood-alcohol tests. *Birchfeld v. North Dakota*, 136 S. Ct. 2160, 2185 (2016). This case now shows how far these laws can go, authorizing one of the most invasive searches imaginable (a blood draw) to be performed on persons who cannot give (or refuse) consent in any real sense of the term.

Left standing, this outcome risks "unleash[ing] a principle of constitutional law" with "no obvious stopping place." *Luis v. United States*, 136 S. Ct. 1083, 1094 (2016). The Court therefore should use this case to reexamine the concept of implied-consent laws, especially in light of the common law and founding era history. Only then is it possible to recognize that the Fourth Amendment in fact embraces just one kind of consent: actual voluntary consent.

ARGUMENT

I. Consent is a hallowed legal concept.

In considering the relationship between implied-consent laws and the Fourth Amendment, the Court should "start with first principles." *United States v. Lopez*, 514 U.S. 549, 552 (1995). Such analysis reveals that "consent" carries a precise meaning in the law—one that cannot be squared with either the theory or practice of implied-consent laws.

A. Consent is an affirmation of free will.

Consent is a matter of "our own judgment."[3] It is the "[a]greement of the mind to what is proposed or stated by another," making it "a yielding of the mind or will to that which is proposed." *State v. Glushko*, 266 P.3d 50, 55 (Or. 2011) (punctuation omitted) (quoting NOAH WEBSTER, 1 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (reprint 1970)); *see also Schweitzer v. Comenity Bank*, 866 F.3d 1273, 1276 (11th Cir. 2017) ("At common law, consent is a willingness for certain conduct to occur.").

Consent, then, is about respect for the human mind and our capacity to choose—i.e., an affirmation of free will. On this basis, the idea of consent plays a seminal role in nearly every field of law. "An essential element of any contract is the consent of the parties, or mutual assent." *Donovan v. RRL Corp.*, 27 P.3d 702,

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[3] GEORGE CRABB, ENGLISH SYNONYMES 228 (London, Baldwin & Craddock, 6th ed. 1837).

815 (Cal. 2001). Property law is likewise founded on consent. *See, e.g.*, *Wilkinson v. Leland*, 27 U.S. 627, 658 (1829) (Story, J.) (noting that legislative attempts "to transfer the property of A. to B. without his consent" are "inconsistent with just principles").

Consent is also a cornerstone of tort law. A person "who effectively consents to [the] conduct of another [that is] intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it." RESTATEMENT (SECOND) OF TORTS § 892A(1) (Am. Law Inst. 1979). "This principle is expressed in the ancient legal maxim, *volenti non fit injuria*, meaning that no wrong is done to one who consents." *Id.* § 892A cmt. a.

With this in mind, when one considers all these appearances of "consent" in the law, three essential aspects of this idea emerge:

First, "the basic premise of consent is that it is 'given voluntarily.'" *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 270–71 (3d Cir. 2013); *see also, e.g.*, *State v. King*, 209 A.2d 110, 113 (N.J. 1965) ("Implicit in the very nature of the term 'consent' is the requirement of voluntariness."). Consent cannot be obtained from the unconscious—or through lies—or at gunpoint. "[C]onsent, in law, is more than a mere formal act of the mind. It is an act unclouded by fraud, duress, or sometimes even mistake." *Cary v. Hotailing*, 1 Hill 311, 314 (N.Y. Sup. Ct. 1841); *see also, e.g.*, *McClellan v. Allstate Ins. Co.*,

247 A.2d 58, 61 (D.C. 1968) ("consent obtained on the basis of deception is no consent at all").

Second, consent is limitable. "A person may limit her consent as she likes, consenting to one act but not another, or to acts at one time but not another, or to acts under some conditions but not others." *Schweitzer*, 866 F.3d at 1276 (punctuation and alterations omitted) (quoting DAN DOBBS ET AL., 1 THE LAW OF TORTS § 108, at 328 (2d ed. 2011)). As such, if "A gives B permission to dump 'a few stones' upon A's land" and "B covers the land with large boulders," consent will not excuse B's conduct. RESTATEMENT (SECOND) OF TORTS § 892A cmt. c, illus. 1; *see id.* § 892A(4) ("If the actor exceeds the consent, it is not effective for the excess.").

Third, "consent is revocable." *Gager*, 727 F.3d at 270 (this is a "basic common law principle"). On this score, "consent is terminated when the actor knows or has reason to know that the other is no longer willing for him to continue the particular conduct." *Id.* § 892A, cmt. i. And once consent to an actor's conduct has been revoked, "the actor is [generally] no longer privileged to continue his conduct." *Id.* Consider the homeowner who asks a guest to leave. This revocation of consent leaves "no right or license" for the guest to remain, no matter how much the guest wants to stay. *Mitchell v. Mitchell*, 55 N.W. 1134, 1135 (Minn. 1893).

Taken together, the preceding aspects of consent demonstrate that consent "isn't some inkblot" onto which legislatures "may project their hopes and dreams." *Cordova v. City of Albuquerque*, 816 F.3d 645,

661 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment). Consent rather stands for the fixed, enduring proposition that the exercise of free will stands apart from "resort . . . to legal measures" or "force and violence." *Mitchell*, 55 N.W. at 304. Put another way, consent is the opposite of compulsion—by law or by force. The Framers knew this all too well.

B. The Framers recognized that consent is fundamentally different from what is "prescribed by law."

For the Framers of the Constitution, the idea of consent was no small matter. In the Declaration of Independence, the Framers condemned Britain "for imposing Taxes on us without our Consent." James Otis was even more blunt: "For what one civil right is worth a rush, after a man's property is subject to be taken from him at pleasure, without his consent?"[4] This led Otis to emphasize that "[i]f a man is not his *own assessor* in person, or by deputy, his liberty is gone, or lays [e]ntirely at the mercy of others."[5]

The Framers thus drew a firm line between consent and legal prescriptions. Consent was something persons had to actually give, as opposed to being something that the government could decree or infer by statute. The best illustration of this may be seen in the Third Amendment to the Constitution: "No Soldier

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[4] JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED & PROVED 38 (Boston, Edes & Gill 1764).

[5] *Id.* (emphasis in original).

shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." *See Engblom v. Carey*, 677 F.2d 957, 966–68 (2d Cir. 1982) (Kaufman, J., concurring-in-part and dissenting-in-part) (providing a detailed history of the Third Amendment).

Under a plain reading, the Third Amendment allows government quartering of troops in homes during wartime with *either* "the consent of the Owner" *or* "in a manner to be prescribed by law." And in peacetime, only owner consent will suffice—there is no prescribed-by-law alternative. It cannot then be the case that all the Third Amendment requires in wartime or in peacetime is passage of a law declaring that all persons consent to the quartering of troops. For the Third Amendment to make sense, "consent" has to mean the opposite of what is "prescribed by law."

The history of the Third Amendment confirms this reading. The Third Amendment was enacted to redress the Quartering Acts of 1765 and 1774, which allowed the peacetime quartering of British troops "wherever necessary, including the homes of the colonists." *Engblom*, 677 F.2d at 967 (Kaufman, J., concurring-in-part and dissenting-in-part). Public revulsion to these Acts led many of the colonies to adopt constitutions that distinguished consent-based quartering of soldiers from legislative-based quartering of soldiers. *See id.* For example, "the Delaware Declaration of Rights, drafted in 1776, provided 'that no soldier ought to be

quartered in any house in time of peace without the consent of the owner, and in time of war in such a manner only as the Legislature shall direct.'" *Id.*

The idea that consent must be actually given by a person is not limited to the Third Amendment. Rather, the "prohibition against the unconsented peacetime quartering of soldiers protects an[] aspect of privacy from governmental intrusion." *Katz v. United States*, 389 U.S. 347, 350 n.5 (1967). That is also the mission of the Fourth Amendment, which guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." It is no surprise then that the same idea of consent behind the Third Amendment may be found in the Fourth Amendment, as defined by this Court.

C. For consent to validate a government search, such consent must have been given freely and voluntarily.

As noted above, the Fourth Amendment forbids "unreasonable searches," whether performed ad hoc by the police or authorized by statute. *See City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449–52 (2014). A "search" for Fourth Amendment purposes is any government conduct that either trespasses on a constitutionally-protected area (i.e., "persons, houses, papers, and effects") or intrudes on a person's reasonable expectation

of privacy. *See United States v. Jones*, 565 U.S. 400, 404–07 (2012).

In cases where the government has conducted a "search," there are only three ways in which the government can validate the search (i.e., show the search is reasonable). One way is by showing that the search was conducted based on a warrant that satisfies the Fourth Amendment's Warrant Clause.[6] Another way is by showing that the search falls under one of the few "historically recognized exception[s] to the Fourth Amendment's general principle that a warrant be obtained." *United States v. Ramsey*, 431 U.S. 606, 621 (1977). Such exceptions include exigent circumstances and searches incident to arrest. *See id.*

The final way is by showing consent. "A search to which an individual consents meets [the] Fourth Amendment . . . ." *Katz*, 389 U.S. at 358 n.22. This makes sense. If consent can validate the quartering of troops in a person's home—a considerable invasion of privacy—consent should also be able to validate the government's search of that home (and any other constitutionally-protected area). *Cf. Engblom*, 677 F.2d at 962 (majority op.) ("The Third Amendment was designed to assure a fundamental right to privacy."). The question then becomes: under what circumstances is it permissible to conclude that consent validates a search?

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[6] *See* U.S. CONST., amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

In *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968), the Court answered this question: "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." Then, in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Court elaborated on the meaning of "freely and voluntarily," explaining that: "whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Id.* at 227–28.

Schneckloth establishes that consent under the Fourth Amendment is cut from the same cloth as consent under the common law. Consent will not validate a search unless the consent was voluntarily given. Moreover, "[a] suspect may . . . delimit . . . the scope of the search to which he consents." *Florida v. Jimeno*, 500 U.S. 248, 252 (1991); *see also Georgia v. Randolph*, 547 U.S. 103, 123 (2006) ("[A] physically present inhabitant's express refusal of consent to a police search is dispositive as to him . . . .").

Given this reality, consent is not an *exception* to the Fourth Amendment as much as it is a *waiver* of rights that must be gauged based on a fact-intensive review of a person's actions.[7] *See United States v.*

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[7] Among the facts to be considered in analyzing consent to a search are: "the characteristics of the accused (such as age, maturity, education, intelligence, and experience) as well as the conditions under which the consent to search was given (such as the officer's conduct); the number of officers present; and the

Carter, 378 F.3d 584, 587 (6th Cir. 2004) ("[I]t is well-settled that a person may waive his Fourth Amendment rights by consenting to a search."). Consent thus stands apart in Fourth Amendment law, such that "a 'search' . . . generally qualifies as 'unreasonable' when [it is] undertaken without a warrant, consent, or an emergency." *United States v. Carloss*, 818 F.3d 988, 1004–05 (10th Cir. 2016) (Gorsuch, J., dissenting). Implied-consent laws scramble this equation.

II. Implied-consent laws have no place in Fourth Amendment jurisprudence.

The common law, founding era history, and this Court's jurisprudence all confirm that consent to a government search means a person giving actual, voluntary agreement to the search. At the same time, the Court's "prior opinions have referred approvingly to the general concept of implied-consent laws." *Birchfeld v. North Dakota*, 136 S. Ct. 2160, 2187 (2016). Close examination of this concept, however, reveals good reason for the Court to reconsider its approval. Simply put, implied-consent laws are the opposite of consent in every possible respect.

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duration, location, and time of the encounter." *United States v. Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996).

A. Implied-consent laws deem consent to exist to government searches.

In form and function, implied-consent laws are a wolf in sheep's clothing. Under the guise of consent, these laws allow searches against a person's will and even while they are unconscious. To appreciate this reality, however, one must first be careful to separate implied-consent laws from the general principle that actual consent to a government search may be delivered in "express or implied" terms. *United States v. Iverson*, 897 F.3d 450, 458 (2d Cir. 2018); *see also Birchfield*, 136 S. Ct. at 2185 ("It is well established that . . . sometimes consent to a search need not be express but may be fairly inferred from context.").

Actual consent to a government search may be given "in the form of words, gesture, or conduct." *United States v. Griffin*, 530 F.2d 739, 742 (7th Cir. 1976). Hence, if the police knock on a person's door, ask permission to enter, and the person "le[aves] the door open and wave[s] them in," actual consent to a search exists despite the person's silence. *Kaminsky v. Schriro*, No. 18-403, 2019 U.S. App. LEXIS 2288, at *5–6 (2d Cir. Jan. 24, 2019). "[C]onsent may be implied by silence where a reasonable person would speak if objecting." *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 904 F. Supp. 818, 821 n.2 (N.D. Ill. 1995).

Implying actual consent from a specific person's reaction to a specific search is a far cry, however, from establishing as a matter of law that an entire class of persons may be deemed to consent to a search no

matter their individual reactions to the search. That is what implied-consent laws do. Consider Georgia's implied-consent law for blood-alcohol searches. Under this law, motorists are "deemed to have given consent" to "blood, breath, [and] urine" tests to enable the police to "determin[e] the presence of alcohol or any other drug." GA. CODE ANN. § 40-5-55(a) (2018). The law also establishes that consent to testing will be deemed to exist even if a motorist is "dead, unconscious, or otherwise . . . incapable of refusal." *Id.* § 40-5-55(b).[8]

It is no exaggeration, then, to say that implied-consent laws stand in direct conflict with "the basic premise of consent." *Gager*, 727 F.3d at 270–71. Consent under these laws is not something that a person voluntarily gives—rather, it is something that the law imposes on persons in a manner they can neither limit nor revoke, not even through unconsciousness or death. These laws seek to take advantage of the idea of consent while failing to do the hard work that this idea calls for: attempt to convince someone to agree to a search without resort to authority or duress.

This is a common problem when it comes to government searches. Consider *United States v. Carloss*, in which the government sought to justify a search on the ground that "it enjoy[ed] a license or invitation flowing from the homeowner." 818 F.3d at 1005 (Gorsuch,

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[8] Georgia is not alone in this regard. *See, e.g.*, ARIZ. REV. STAT. § 28-1321(C) (2018); ARK. CODE ANN. § 5-65-202(b) (2018); COLO. REV. STAT. § 42-4-1301.1(8) (2018); OHIO REV. CODE ANN. § 4511.191(A)(4) (2018).

J., dissenting). To this end, in the name of consent, the government asked the court to enshrine the opposite: that "its agents enjoy[ed] a special and irrevocable right to invade a home's curtilage for a knock and talk . . . whatever the homeowner may say or do about it." *Id.* Implied-consent laws are but a variation on this theme—and one that is wholly lacking in justification.

B. None of the grounds on which implied-consent laws deem consent to exist withstand close scrutiny.

In considering implied-consent laws, courts have offered two main justifications for why consent to certain government searches can be "implied" by law. The first is voluntary participation in some otherwise lawful activity related to the search—e.g., "motorists may be deemed to have consented by virtue of [their] decision to drive on public roads." *Birchfeld*, 136 U.S. at 2185. The second is the presence of a putative choice between submitting to a search or accepting "penalties and evidentiary consequences" for refusing to comply. *Id.* Both explanations fall short.

The problem with implying consent to a search based on a person's voluntary participation in a lawful activity (e.g., driving) is that the government in general "may not impose conditions which require the relinquishment of constitutional rights." *Frost & Frost Trucking Co. v. R.R. Comm'n of Cal.*, 271 U.S. 583, 594 (1926). For good reason: "[i]f the state may compel the

surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all." *Id.* A state cannot then by law turn a person's voluntary participation in a lawful activity into a waiver of that person's Fourth Amendment rights, which is what consent to a search by definition means. *See Carter*, 378 F.3d at 587.

The Court has recognized as much in dealing with other equally important constitutional rights. In *Horne v. Department of Agriculture*, for example, the government argued to the Court that regulatory expropriation of raisins from certain raisin growers was not an unconstitutional taking "because raisin growers voluntarily choose to participate in the raisin market." 135 S. Ct. 2419, 2430 (2015). As the government put it: "[I]f [the] raisin growers don't like it, they can 'plant different crops'. . . ." *Id.*

This Court disagreed. "[P]roperty rights cannot be so easily manipulated." *Id.* (punctuation omitted). The same goes for Fourth Amendment rights. They cannot be eliminated on the premise, that if motorists don't like it, for example, they can take the bus. In the same vein, the Court has observed that only "the most fictional sense of voluntary consent to . . . searches [can] be found in the single fact that one conducts a business affecting interstate commerce." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 314 (1978)

The second conceptual explanation for implied-consent laws—that consent may be implied from the choice that these laws offer between submission and

punishment—fares no better. "[S]ubmission to law-enforcement . . . [is] not such consent as constitute[s] . . . [a] voluntary waiver . . . [of] the Fourth Amendment." *United States v. Elliott*, 210 F. Supp. 357, 360 (D. Mass. 1962). By extension, the "decision to step aside and permit" a search "rather than face a criminal prosecution" also does not equal "consent." *United States v. Biswell*, 406 U.S. 311, 315 (1972).

In the end, just as "[s]tatutes authorizing warrantless searches . . . do no work where the subject of a search has consented," the same is true when the subject of a search has *not* consented (i.e., not given actual consent). *City of Los Angeles*, 135 S. Ct. at 2451; *see also Biswell*, 406 U.S. at 315 ("[T]he legality of the search depends not on consent but on the authority of a valid statute."). Consent to government searches cannot be manufactured by law—and the Framers' bitter experience with statutes authorizing warrantless searches only confirms this point.

C. The Framers would have rejected the idea of implied-consent laws.

In construing the Fourth Amendment, history is critical. "One cannot wrench 'unreasonable searches' from the text and context and historic content of the Fourth Amendment." *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., and Jackson, J., dissenting). It is therefore essential as part of any effort to "determin[e] whether a search or seizure is unreasonable" to consult "the statutes and common law of

the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Virginia v. Moore*, 553 U.S. 164, 168 (2008).

The Fourth Amendment "grew in large measure out of the colonists' experience with . . . writs of assistance." *United States v. Chadwick*, 433 U.S. 1, 7–8 (1977). "A writ of assistance was a court order to individuals to assist customs officers in . . . their duties."[9] "[T]he writ did not authorize a search; it merely vouched for the identity of the customs officers who by their commissions were authorized to search."[10] At bottom, the writs gave "customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws." *Stanford v. Texas*, 379 U.S. 476, 481 (1965).

Sixty-three Boston merchants hired James Otis to challenge the writs in court. *See Commw. v. Haynes*, 116 A.3d 640, 649–50 (Pa. Super. Ct. 2015). Otis did so in a 1761 speech that inspired President John Adams to proclaim: "Then and there the child Independence was born." *Riley v. California*, 134 S. Ct. 2473, 2495 (2014). During his speech, Otis explained that a "person with this writ . . . may enter all houses, shops, etc., at will,"[11] making the writs "the worst instrument of arbitrary power."[12]

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[9] Tracy Maclin & Julia Mirabella, *Framing the Fourth*, 109 MICH. L. REV. 1049, 1053 n.18 (2011).

[10] *Id.* (internal punctuation and alterations omitted).

[11] 2 WORKS OF JOHN ADAMS 524 (C. Adams ed. 1850).

[12] *Id.* at 523.

Following Otis's attack on the writs, Parliament enacted the 1767 Townshend Act. The Act noted that it was "doubted whether . . . officers can legally enter houses and other places on land, to search for and seize goods."[13] "To obviate . . . [these] doubts for the future," the Act expressly authorized "such writs of assistance" as would enable British customs officials "to enter and go into any house, warehouse, shop, cellar, or other place" in America "to search for and seize prohibited or uncustomed goods."[14]

The Townshend Act did not pacify the Framers. "American judicial intransigence was sufficiently strong that local customs officials in several states did not even bother to apply for the writs." *State v. Ochoa*, 792 N.W.2d 260, 271 (Iowa 2010). It is then impossible to believe that the Framers would have found the writs reasonable if only the Townshend Act read like an implied-consent law, deeming consent to exist by virtue of the colonists' decision to trade in taxed goods. This leaves no doubt that the Framers would have rejected the idea of implied-consent laws.

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[13] The full text of the Townshend Act may be viewed as part of the Yale Law School's Avalon Project. *See* http://avalon.law.yale.edu/18th_century/townsend_act_1767.asp.

[14] *Id.*

III. The Court should clarify in *Mitchell* that actual consent is the only kind of consent that the Fourth Amendment respects.

Seventy years ago, Justice Jackson warned that "any privilege of search and seizure without warrant" sustained by this Court will be "push[ed] to the limit." *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting). Fourth Amendment cases thus require the Court to contemplate not only "what has been" but also "what may be." *Weems v. United States*, 217 U.S. 349, 373 (1910). Based on these principles, the Court should now clarify that the only kind of consent that will validate a search under the Fourth Amendment is actual voluntary consent.

In this case, the Wisconsin Supreme Court held that an implied-consent law established consent on the part of an unconscious driver to a blood draw consistent with the Fourth Amendment. *See* Cert. Pet. App. 22a. If a legislature can deem consent to exist under these circumstances, there is no stopping point. "[H]istory exemplifies the tendency of a principle to expand itself to the limit of its logic." *Krulewitch v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring) (quotation marks omitted).

For example, consider the risk that implied-consent laws pose to the Court's landmark 2014 decision in *Riley v. California*, 134 S. Ct. 2473 (2014). The Court held in *Riley* that absent exigency, "what police must do before searching a cell phone" is "simple": "get a warrant." *Id.* at 2495. Yet, in 2016, Vermont

considered passing a law under which all motorists would be "deemed to give . . . consent to search a portable electronic device" to let the police find out if a motorist was texting-while-driving.[15]

The risks posed by implied-consent laws do not stop at the highway's edge. The government has also sought to extend their logic to searches of the home. *See, e.g., Elkins v. District of Columbia,* 710 F. Supp. 2d 53, 65 (D.D.C. 2010) (noting the government's argument that "obtaining a building permit for a private home constitutes 'implied consent' to search for a review of construction work"). This is despite the fact that "the home is first among equals" under the Fourth Amendment. *Florida v. Jardines*, 569 U.S. 1, 6 (2013). Indeed, the concept of implied consent now "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

Actual voluntary consent, on the other hand, reflects "the long view, from the original meaning of the Fourth Amendment forward." *Kyllo v. United States*, 533 U.S. 27, 34 (2001). The Court should not hesitate to restore that view. "The Fourth Amendment is, after all, supposed to protect the people at least as much now as it did when adopted, its ancient protections still in force whatever our current intuitions or preferences

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[15] Vt. H.B. 527 (2016), *available at* https://bit.ly/2IRXwU5; *see also* Jess Aloe, *Proposed Law Could Allow Warrantless Phone Searches*, BURLINGTON (VT.) FREE PRESS, Jan. 17, 2016, http://bfpne.ws/1UYvnpj.

might be." *Carloss*, 818 F.3d at 1011 (Gorsuch, J., dissenting).

CONCLUSION

The idea of consent is second-to-none in terms of its ability to validate a variety of conduct, including government searches. The text, history, and purpose of the Fourth Amendment, in turn, establish that the only kind of consent that the Fourth Amendment respects is actual voluntary consent. The Court should use this case to make that clear.

Respectfully submitted,

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